SUKMA DARMAWAN SASMITAAT MADJA

v.

KETUA PENGARAH PENJARA MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-110-98]
7 NOVEMBER 1998

CRIMINAL PROCEDURE: *Habeas Corpus - Proper procedure - Whether person convicted and sentenced under Penal Code may apply for writ - Distinction between application under s. 365 of Penal Code and art. 5(2) of Federal Constitution - Whether convict must proceed by way of appeal or revision first - Whether may proceed by way of habeas corpus if appeal or revision available - Jurisdiction of High Court under art. 5(2) of Federal Constitution - Whether mandatory for High Court to hear application*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether jurisdiction of Sessions Court ousted - Whether Syariah Court conferred with jurisdiction - Federal Constitution, art. 121(1A) - State List of Ninth Schedule - Jurisdiction of Syariah Court over criminal offences - Whether jurisdiction must be specifically conferred upon Syariah Court by federal law*

CRIMINAL PROCEDURE: *Jurisdiction of court - Sessions Court - Whether has jurisdiction over offence of "liwat" under s. 25 of Syariah Criminal Offences (Federal Territories) Act 1997 - Whether "liwat" solely within jurisdiction of Syariah Court*

CRIMINAL PROCEDURE: *Jurisdiction of court - Sessions Court - Offences - Muslims - Penal Code, s. 377D - Whether jurisdiction over s. 377D conferred upon Syariah Court - Whether Sessions Court retains jurisdiction over s. 377D even if offence was allegedly committed by Muslims*

CRIMINAL LAW: *Penal Code, s. 377D - Gross indecency - Jurisdiction of Sessions Court - Whether jurisdiction over offence conferred upon Syariah Court - Whether jurisdiction of Sessions Court ousted by art. 121(1A) of Federal Constitution - Whether applicant lawfully convicted and sentenced - Whether habeas corpus available*

The applicant had earlier pleaded guilty to a charge of gross indecency under s. 377D of the Penal Code ('the Code') and was convicted and sentenced to six months' imprisonment by the Sessions Court. This was his application for a writ of *habeas corpus*, principally on the ground that the Sessions Court had no jurisdiction to hear, convict or sentence him by virtue of the operation

of art. 121(1A) of the Federal Constitution ('the FC') and s. 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559'). At the hearing of the application, the respondent took the preliminary objection that the applicant was not at liberty to proceed by way of *habeas corpus* as the issue of whether the Sessions Court had the jurisdiction could and should be determined by way of appeal or revision.

Held:

[1] The preliminary objection might have had some basis if the application was proceeded solely under s. 365 of the Code. However, the applicant had also applied under art. 5(2) of the FC which made it mandatory for the court to hear the application. It was not necessary for the applicant to show that there was no other process available; the High Court had the power to hear the application even if there was an avenue for appeal or revision. Section 365 of the Code cannot restrict the efficacy of art. 5(2) of the FC and the term "detention" in the latter provision encompasses arrest, remand, imprisonment and any other forms of custodial limitation on the fundamental liberties guaranteed under art. 5 thereof.

[1a] The applicant is already serving his sentence; in the event that he is successful in his appeal and the Sessions Court is held to have had no jurisdiction, the applicant would have lost his liberty whilst waiting for his appeal or revision to be heard. Hence, the applicant must be able to proceed by way of *habeas corpus*, and the preliminary objection had to be overruled.

[2] Whenever there is a challenge to jurisdiction, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction upon the Syariah Court.

[2a] Article 121(1A) of the FC does not automatically confer jurisdiction upon the Syariah Court, even in respect of the matters enumerated in the State List of the Ninth Schedule. To confer jurisdiction, the State must first act upon the power given it by arts. 74 and 77 of the FC and enact laws conferring such jurisdiction; only then will a matter come under the jurisdiction of the Syariah Court to the exclusion of the civil courts.

[2b] There is a very clear distinction between a State Legislature's "power to make laws" under art. 74 of the FC and the "jurisdiction of the Syariah Courts" under art. 121(1A) thereof. Hence, although a State may make laws in respect of the matters enumerated in Item 1 of the State List of the Ninth Schedule, yet the Syariah Court "shall **not** have jurisdiction in respect of **offences** except in so far as conferred by federal law." A Syariah Court is not a court of inherent jurisdiction. It is created by the power in Item 1 of the State List of the Ninth Schedule, and it relies on federal law for its jurisdiction over **offences**.

[3] The offence of "liwat" as defined in Act 559 is one over which the Syariah Court has been conferred jurisdiction by federal law. Therefore, and by operation of art. 121(1A) of the FC, the offence of "liwat" is solely within the jurisdiction of the Syariah Court and the Sessions Court has no jurisdiction whatsoever.

[3a] However, jurisdiction is conferred upon the Syariah Court over an **offence** and not by a description of the **act** complained of. The effect of art. 121(1A) of the FC is to confer upon the Syariah Court exclusive jurisdiction over the offence of "liwat", not the act of sodomy *per se*.

[3b] Offences of indecency under Act 559 can exit concurrently with offences of indecency under the Code. Article 121(1A) of the FC and Item 1 of the State List of the Ninth Schedule operate to the effect that unless and until jurisdiction over an offence, whether created by federal law or State law, is conferred upon the Syariah Court, the Sessions Court continues to have jurisdiction.

[3c] Article 121(1A) of the FC does not remove the jurisdiction of the Sessions Court over a Muslim for any offence in respect of which jurisdiction has not been specifically conferred upon the Syariah Court. Since jurisdiction over the offences created by s. 377A and 377D of the Code has not being conferred upon the Syariah Court by federal law, the Sessions Court retains its jurisdiction over these offences even if they were committed by a Muslim.

[3d] The offence of gross indecency under s. 377D of the Code is one over which jurisdiction has not been conferred upon the Syariah Court by federal law; hence, art. 121(1A) of the FC cannot operate to remove the jurisdiction of the Sessions Court therefrom. Consequently, the applicant was lawfully convicted and sentenced by the Sessions Court. Where a person is serving a sentence passed by a court of competent jurisdiction, the writ of *habeas corpus* is not available.

Per curiam:

[1] Where the Public Prosecutor has made a decision (in respect of criminal prosecutions and proceedings), it is not for the court to question that decision; his discretion is unfettered. It is irrelevant to the court if the facts warrant a possibly more serious charge, or that the accused could have been be charged in another court for another offence. Before convicting on a plea of guilty, the court is only concerned with the question whether all the elements of the charge have been admitted.

[Application dismissed.]

Cases referred to:

Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Idrus [1981] 1 MLJ 29 FC ***(refd)***

Datuk Harun Hj Idris v. Officer-in-Charge, Pudu Prison [1981] 2 MLJ 72 FC ***(cit)***

Gurdit Singh [1933] MLJ Vol II 224 ***(cit)***

Hashim Saud v. Yahaya Hashim & Anor [1973] 2 MLJ 85 ***(cit)***

Hj Laughan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85 ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458 ***(refd)***

Kharak Singh v. Uttar Pradesh AIR [1963] SC 1295 ***(cit)***

Lim Chan Seng v. Pengarah Jabatan Agama Pulau Pinang & Satu Lagi [1996] 3 CLJ 231 ***(refd)***

Long Samat & Ors [1974] 2 MLJ 152 ***(refd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1997] 4 CLJ Supp 419 ***(dist)***

Mohamad Habibullah Mahmood v. Faridah Dato Talib [1993] 1 CLJ 264 ***(foll)***

Nor Kursiah Baharuddin v. Shahril Lamin & Anor [1997] 1 CLJ Supp 599 ***(dist)***

PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***

PP v. Lee Tin Bau [1985] 1 MLJ 388 ***(refd)***

PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 FC ***(refd)***

Ramachandra v. State Of Orissa AIR [1971] SC 2197 ***(cit)***

Re Gurbachan Singh's Application [1967] 1 MLJ 74 ***(cit)***

Tun Datu Hj Mustapha Datu Harun v. State Legislative Assembly of Sabah & Anor [1993] 1 CLJ 86 ***(refd)***

Wong Lai Fatt v. PP [1971] 2 MLJ 31 FC ***(cit)***

Yeap Hock Seng v. Minister of Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(cit)***

Legislation referred to:

Courts of Judicature Act 1964, s. 84
Criminal Procedure Code, ss. 306, 365, 376(i)
Federal Constitution, arts. 5(2), 8, 74, 75, 121(1A), 145(3)
Penal Code, ss. 2, 377A, B, C, D, E
Syariah Criminal Offences (Federal Territories) Act 1997, ss. 1(2)(b), 2, 25

For the appellant - Karpal Singh (Jagdeep Singh Deo & Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Dato' Ahmad Maarop (Kamaludin Md Said with him)

Reported by Gan Peng Chiang

JUDGMENT

Abdul Wahab Patail J:

The applicant Sukma Darmawan Sasmitaat Madja having pleaded guilty to a charge under s. 377D Penal Code (FMS Cap. 45), was convicted and sentenced to six months' imprisonment for an act of gross indecency by the Sessions Court, Kuala Lumpur on 19 September 1998. He has filed an appeal against the sentence.

By this application he is applying for a writ of *habeas corpus*. The ground for the application is that since both the persons committing the offence are Muslims, the Sessions Court had no jurisdiction to hear, convict and sentence the applicant by virtue of the operation of art. 121(1A) of the Federal Constitution of Malaysia ("the constitution"), in view of the Syariah Criminal Offences (Federal Territories) Act 1997 (Akta 559) ("Act 559").

The Main Constitutional And Statutory Provisions

Section 377D of the Penal Code ("Section 377D", "the Code") provides:

> 377D. Outrages on decency.
>
> Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.

The applicant was charged as follows:

> Bahawa kamu, pada bulan April 1998 pada sebelah malam di Kediaman Rasmi Timbalan Perdana Menteri di No. 47, Jalan Damansara, dalam Wilayah Persekutuan, Kuala Lumpur telah melakukan perbuatan kelucahan melampau dengan Dato' Seri Anwar Ibrahim dengan membenarkan Dato' Seri Anwar Ibrahim memasukkan zakarnya ke dalam dubur kamu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 377D Kanun Keseksaan.

Articles 121 and 121(1A) of the Constitution provides:

> 121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

Section 25 of Act 559 (s. 559) provides:

25. Mana-mana orang lelaki yang melakukan liwat adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi lima ribu ringgit atau dipenjarakan selama tempoh tidak melebihi tiga tahun atau disebat tidak melebihi enam sebatan atau dihukum dengan mana mana kombinasi hukuman itu.

[25. Any male person who commits liwat shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.]

The Preliminary Objection

The learned senior federal counsel and senior deputy public prosecutor Datuk Ahmad Maarof had made a preliminary objection as to whether the applicant may avail himself of a writ of *habeas corpus*. It was submitted that (a) the question of whether or not the Sessions Court had jurisdiction could and should be dealt with by way of an appeal or revision under the Criminal Procedure Code (FMS Cap 6) and therefore (b) a writ of *habeas corpus* is not available.

If the application for a writ of *habeas corpus* is made under s. 365 of the Criminal Procedure Code (s. 365), there might be basis for the argument. It might have been accepted that even though an appeal against conviction after a plea of guilty is barred by s. 306 of the Criminal Procedure Code (s. 306), the matter having otherwise come to the attention of the judge, could be revised in the event of illegality. The case of *Wong Lai Fatt v. PP* [1973] 2 MLJ 31 FC may be referred to as an illustration.

The power under s. 365, is discretionary since the section provides 'the court may whenever it thinks fit ...'. Where there is an alternative basis for overturning a decision, whether by way of appeal or revision under the Code, those routes must first be exhausted. An application for a writ of *habeas corpus* under s. 365 by a person who has pleaded guilty might be considered if there is evidence that he has sought revision and it has been denied. The cases cited, *Re Gurbachan Singh's Application* [1967] 1 MLJ 74; *Gurdit Singh* [1933] MLJ Vol II 224, *Ramachandra v. State of Orissa* AIR [1971] SC 2197 concerned *habeas corpus* applications under the Criminal Procedure Code and had held that a writ of *habeas corpus* cannot be granted to a person who is serving a sentence passed by a court of competent jurisdiction. The Federal Court in *Datuk Harun bin Haji Idris v. Officer-in-Charge, Pudu Prison* [1981] 2 MLJ 72 FC, came to the same conclusion in respect of a superior court.

However the learned Encik Karpal Singh has ensured that the applicant also applied under art. 5(2) of the Constitution:

> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

This application is a complaint that the applicant has been unlawfully detained. It is not a general allegation that his imprisonment is unlawful. He has given specific reasons for his complaint. If it is true as alleged that the Sessions Court has no power to try, convict and sentence in respect of a charge for sexual relations between two male Muslims because art. 121(1A) of the Constitution read with s. 25 of Act 559 seems to suggest, then his trial, conviction and sentence is in substance unlawful, and no plea of guilty could cure that defect. That defect is not merely acting beyond jurisdiction (often incorrectly termed 'out of jurisdiction'), where an appeal or revision would be the correct procedure, but one where the substratum of jurisdiction itself may not exist. While an appeal is the proper procedure in a case of a court of competent jurisdiction but is acting beyond jurisdiction, it is much less obvious in a case where the question is whether the court is a court of competent jurisdiction.

Article 5(2) of the Constitution makes it mandatory for the court to hear the complaint and unless satisfied that the detention is lawful, the court must order the person to be produced before it and to release him: *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279. It is not necessary for an applicant to show there is no other process available (*Kharak Singh v. Uttar Pradesh* AIR [1963] SC 1295). This provision was included in the Constitution notwithstanding that there already existed

provisions for directions in the nature of *habeas corpus* in the Criminal Procedure Code. Section 365 of the Criminal Procedure Code cannot be read as to restrict the meaning of art. 5(2). The term detention as used in art. 5(2) must be given a wide meaning to encompass arrest, remand, imprisonment or any other form of custodial limitation of the liberty guaranteed under art. 5, howsoever it may be termed. Even if there is avenue for an appeal or revision, it cannot be said that in such a case the High Court has no power to hear an application for *habeas corpus*. It is essential to consider the circumstances of the case. In this case the applicant is serving sentence. If on an appeal it is held that the Sessions Court had no competent jurisdiction, he would have lost his liberty unlawfully while waiting for his appeal or revision to be heard, and the court cannot be party to it. Thus in a matter involving not merely a question of exceeding its jurisdiction but the competency of the court itself, and an applicant is being detained or imprisoned by an order of that court, *habeas corpus* must be available as a remedy under art. 5(2).

To summarise, the applicant has complained his imprisonment is unlawful. He has given specific reasons for his complaint. The respondent must answer the reasons given to the satisfaction of the court, and if the court is not satisfied, then the court must in terms of art. 5(2) order that he be produced before the court to be released. That upon a consideration of the merits the application for a *habeas corpus* application would fail is no ground for refusing to hear a *habeas corpus* application under art. 5(2), for to do so would prejudge the merits of the application itself.

The writ, to give it its full name, of *habeas corpus ad subjiciendum* (that you have the body to submit or answer), commonly known as the writ of *habeas corpus*, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention. The court would be taking a major step backwards contrary to the letter and spirit of art. 5 of the constitution if it were to accept the preliminary objection and order the applicant to rely on the appeal procedure alone in this case.

Given these considerations the court dismissed the preliminary objection. On further consideration of the matter at the end of the submissions, I see no reason to change that ruling on the preliminary objection.

The Application For A Writ Of Habeas Corpus

The applicant now claiming to be a Muslim, was charged with an offence under s. 377D in the Sessions Court. The question before the court is whether the operation of art. 121(1A) read with s. 25, has ousted the jurisdiction of the Sessions Court to the Syariah Court over the applicant in respect of his admitted act of sodomy.

Jurisdiction: Article 121(1A) Of The Constitution And Item 1, List 2 – States List Of The Ninth Schedule ("Item 1")

It is useful in this regard to return to the exact words of the constitution.

Article 121(1A) provides:

> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

Item 1 provides:

> 1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion*, ***except in regard to matters included in the Federal List;*** *the constitution, organisation and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph,* ***but shall not have jurisdiction in respect of offences except in so far as conferred by federal law,*** the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. [Emphasis added].

The reference to Item 1 is relevant since Parliament in legislating for the purposes of laws for persons professing the religion of Islam in respect of the Federal Territories of Kuala Lumpur and Labuan: see Item 6(c), Federal List, Ninth Schedule of the Constitution.

What then is within the jurisdiction of the Syariah Court, under the Syariah Criminal Offences (Federal Territories) Act, and specifically, s. 25 thereof?

The approach to be applied in the interpretation of the Constitution was provided by the Federal Court in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi bin Syed Idrus* [1981] 1 MLJ 29 FC, 32:

> In interpreting a constitution two points must be borne in mind. First judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly a Constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – with less rigidity and more generosity than other Acts (See *Minister of Home Affairs v.*

Fisher). A Constitution is *sui generis,* calling for its own principles of interpretation suitable to its character but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument giving rise, amongst other things to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St. Christopher, Nevis and Anguila v. Reynolds.*

The meaning of 'jurisdiction' as used in art. 121(1A) must necessarily be addressed.

Of Power To Make Law And Jurisdiction Of Courts

It is a basic principle of art. 74 of the Constitution that if a matter is listed in a Federal List in The Ninth Schedule, the Federal Parliament has the power to make laws in respect of that matter. Likewise in the case of a State with regard to matters in the State List in The Ninth Schedule ("the State List"). There is also the Concurrent List in respect of which matters both the Federal and the State Legislatures have power to legislate, and art. 75 provides the rule to be applied when a State Law is inconsistent with a Federal law.

The State List is a list of the matters over which the State legislature is given power to legislate. In the particular context of the Syariah Courts, Item 1 quoted above, sets out the outer limits of the authority of the State to set up and empower the Syariah Courts. It is obvious therefore that it does not directly create and empower the Syariah Courts. A Syariah court would not exist until the State exercises its power under Item 1 of the State List to create it. Likewise, a Syariah court so created cannot have jurisdiction over a matter unless State law empowers it.

In *Mohamad Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793 SC, the Supreme Court held that the first step of any consideration is that the civil courts would be denied jurisdiction in Syariah matters within the states' legislative competence only when and to the extent the Syariah Courts are by law expressly conferred with such a jurisdiction:

> It is obvious that the intention of Parliament by art. 121(1 A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the syariah court: *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the syariah court has jurisdiction and not whether the State legislature has power to enact the law conferring jurisdiction on the syariah court. The validity of a State law can only be questioned in a separate proceeding under art. 4(3) of the Federal Constitution ... And by art 4(4) read with art 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3). (Emphasis added).

In *Lim Chan Seng v. Pengarah Jabatan Agama Pulau Pinang & Satu Lag*i [1996] 3 CLJ 231, the view was expressed thus:

> ... by itself *inter alia,* Art 121(1A) does not automatically confer jurisdiction to the Syariah court, even in respect of matters that fall under the State List of the Ninth Schedule. To confer the jurisdiction the State must first act upon the power given it by arts 74 and 77 of the State List, and accordingly enact laws conferring the jurisdiction. Only then will the matter come under the jurisdiction of the Syariah court to the exclusion of the civil court ...

It has been said the High Court in *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419; [1998] 1 MLJ 681 adopted a different approach, taking the view that so long as it is a matter that is in the State List as being within the purview of the Syariah Court, then that matter is not within the jurisdiction of the civil courts. In that case it was held that whether a person is Muslim or not is a matter for the Syariah court to determine.

If that is a correct interpretation of *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur,* and that interpretation is applied to offences, it could logically suggest that a whole range of offences otherwise applicable to all persons may not be chargeable against Muslims in our criminal courts even if no corresponding offence has been enacted into law by the relevant legislative body authorised to do so under Item 1.

In *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur,* the applicant had applied for a declaration that his renunciation of the Islamic religion by a deed poll is in accordance with the law and valid, and that he does not require the consent of the defendant to renounce the religion of Islam. There is no express provision with regard to such procedure and matter in the Administration of Islamic Law (Federal Territories) Act 1993. Thus there were in fact no express provision as to whether the matter is to be dealt with in the civil courts or the Syariah Courts. In those circumstances, and following the reasoning of Harun Hashim SCJ in *Mohamed Habibullah*

bin Mahmood v. Faridah bte Dato Talib that from the beginning the makers of the constitution clearly intended that Muslims in this country be governed by Muslim Family law as evident from the Ninth Schedule, and that the purpose of art. 121(1A) was to grant exclusive jurisdiction to the Syariah Courts in the administration of Islamic laws, the High Court held that the absence of express provision with regard to the procedures for renunciation of the Islamic religion by the Syariah Courts does not confer upon the civil courts jurisdiction over that matter.

Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur dealt with an issue of Islamic law, which is clearly in the purview of the State. It dealt with a situation where there were no legislation in a matter clearly within the power of the State to make law. It dealt with a different set of circumstances. It did not deal with, as in the case before this court, offences as such, which is a specific power given in the Federal List to Parliament.

The constitution, while using the term 'power' with regard to making laws in art. 74, avoided using the word in art. 121(1A). Instead the phrase used is 'the jurisdiction of the Syariah courts'. There is in my view a very clear distinction between the 'power to make law', and the 'jurisdiction of the Syariah courts'. The State List gave power to the State in matters set out therein, to make law. One of the powers given to the State is *'creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List'*. But although the State may create such laws, the Syariah court has *'jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph'*, that jurisdiction itself is limited to jurisdiction in respect of offences *'in so far as conferred by federal law'*.

A Syariah court is thus not a court of inherent jurisdiction. It is created by the power in Item 1, and it relies on federal law for its jurisdiction over offences: *Nor Kursiah bte Baharuddin v. Shahril bin Lamin & Anor* [1997] 1 CLJ Supp 599; [1997] 1 MLJ 537.

Item 1 gives power to the State to make laws, to set up Syariah Courts, to have jurisdiction over persons professing the religion of Islam, **but only** in respect of Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal

or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters in the Federal List.* The power to make law for criminal law is in the Federal List.

A further qualification is *"but shall not have jurisdiction in respect of offences except in so far as conferred by federal law,"*. The further qualification emphasises the qualification made earlier, that the power granted to the State does not extend to creation of criminal laws, and where offences are created in the course of legislating on matters within the State's power to make laws under Item 1, the Syariah court would have jurisdiction over such offences only to the extent jurisdiction is conferred upon it by federal law.

For the foregoing reasons *Nor Kursiah bte Baharuddin v. Shahril bin Lamin & Anor* is distinguishable since in that case a custody order had been issued by the Syariah court, being a court of competent jurisdiction. Following *Mohamad Habibullah bin Mahmood v. Faridah bte Dato Talib,* this court must in this case firstly see whether Parliament has in fact conferred jurisdiction upon the Syariah Court, and not whether the Parliament has power to enact the law conferring jurisdiction on the Syariah Court.

Of Physical Acts And Offences: Jurisdiction Of The Courts

The act which the applicant has confirmed in pleading guilty to the charge under s. 377D to the offence of gross indecency is to allow Dato' Seri Anwar Ibrahim to perform an act of sodomy, that is "membenarkan Dato' Seri Anwar Ibrahim memasukkan zakarnya ke dalam dubur kamu".

It is trite that committing an act alone is not an offence. An act becomes an offence if a law makes it into an offence. Except perhaps in the case of an absolute offence, the combination of physical act *(actus reus)* together with the requisite mental element *(mens rea)* constitutes the offence. There is a clear distinction between an offence and the act one is accused of. The act and the offence are not synonymous.

Various offences are routinely created by State law in respect of the matters in the State List, being a necessary adjunct for effective enforcement of such laws. Since the constitution provides for a single system of administration of justice under Item 4 of the Federal List in the Ninth Schedule, such offences are tried in the courts set up under the Courts of Judicature Act 1964.

The only exception to this is the Syariah Courts for the specific purposes in Item 1 of the State List, and their jurisdiction over offences are in so far as conferred by federal law. Article 121(1A), added to the constitution in 1988, could not have been intended, and therefore cannot be interpreted as, to have

such consequences as which would alter the basic structure of the constitution as to jurisdiction over offences. It has to be read within the strict literal meaning of its terms.

Item 1 states clearly that the Syariah court has 'jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included Item 1' but, 'shall not have jurisdiction in respect of offences except in so far as conferred by federal law'. In simple terms, the Syariah court has jurisdiction over all Muslims in respect of the various matters stated in Item 1, except for offences. With regard to offences by persons professing the religion of Islam against precepts of that religion, the Syariah court shall have jurisdiction only to the extent it is conferred by federal law.

Section 1(2) of Act 559 provides that the Act applies to persons professing the religion of Islam ('Muslim') in the Federal Territories of Kuala Lumpur and Labuan. Section 1(2) of Act 559 read with Item 1 means that the basis of the Kuala Lumpur Syariah Court's jurisdiction in relation to offences is therefore not only that the accused is a Muslim in Kuala Lumpur, but that the offence is also one over which it is conferred jurisdiction by federal law. There is nothing that requires that both parties to the act of sodomy be Muslims, since jurisdiction is conferred on the basis of the offence and not that the parties are Muslims. That the offence of *Liwat* is one over which the Syariah Court has been conferred jurisdiction by Federal law has not been disputed by the respondents in this case. Therefore the court also concludes that the offence of *Liwat* is an offence within the jurisdiction of the Syariah Court. The court also concludes that in view of s. 1(2)(b) of Act 559, the offence of *Liwat* in the Syariah Court requires that the accused be a Muslim.

To summarise, the factors that confer jurisdiction to the Syariah Court in respect of an offence are:

a) The person charged is a Muslim,

b) The offence is committed within the geographical jurisdiction area of the Syariah Court, and that

c) A federal law has conferred jurisdiction over the offence to the Syariah Court.

The court therefore agrees with Encik Karpal Singh that jurisdiction over the offence of *Liwat* under Act 559, defined as sexual relations between male persons, of whom the accused is a Muslim, by the operation of art. 121(1A) of the constitution is solely within the jurisdiction of the Syariah Courts, and that the Sessions Court has no jurisdiction whatsoever over that offence of *Liwat.*

However, reading art. 121(1A) together with Item 1, jurisdiction is conferred to a Syariah Court over an offence, not by a description of the act complained of. The effect of art. 121(1A) then is to confer to the Syariah Court exclusive jurisdiction over the offence of *Liwat*, not the act of sodomy *per se*.

Section 377D of the Penal Code exists under the power given to Parliament to make laws in respect of criminal law under Item 4 and Item 4(h). The Penal Code is applicable to every person (s. 2).

The jurisdiction of a Syariah Court being dependent upon being conferred jurisdiction over the offence by federal law, the court therefore holds that art. 121(1A) does not remove the jurisdiction of the Sessions Court over a Muslim for any offence jurisdiction over which has not been specifically conferred upon the Syariah Court. In the context of this case, the jurisdiction over the offences created by s. 377A or s. 377D of the Penal Code not having been conferred upon the Syariah Court by federal law, the Sessions Court retains jurisdiction over these offences.

Offences Of Indecency: Liwat And Gross Indecency

Every person may have a different view of what is indecent. Our individual perception of what is indecent depends upon our upbringing, which includes religious, cultural and family values. Considering the racial, cultural and religious diversity in Malaysia, Parliament has seen fit to legislate, not against all acts a particular individual perceives as indecent, but against those generally accepted as grossly indecent. Of the grossly indecent acts Parliament saw fit to legislate against, gross indecency in s. 377D is the widest in meaning and the least serious offence, attracting imprisonment only of up to two years. Section 377E, inciting a child under 14 years old to an act of gross indecency is more serious, with punishment of up to five years and whipping. Even more serious is carnal intercourse against the order of nature with consent, attracting punishment in s. 377B of imprisonment up to 20 years and whipping. Most serious is carnal intercourse against the order of nature without consent, which attracts a minimum imprisonment term of five years under s. 377C, and which may extend to 20 years, and whipping.

Part IV of Act 559, on the other hand, gives to the Syariah Court jurisdiction over specific offences relating to decency. These are for incest, prostitution, procuring, sexual intercourse out of wedlock, act preparatory to sexual intercourse out of wedlock, sexual relations between male persons, sexual relations between female persons, khalwat or close proximity, male person posing as woman, and indecent acts in a public place. Section 25 in this Part IV created the offence of *Liwat*, defined in s. 2 thereof as sexual relations between male persons.

While s. 377D of the Code created the offence of gross indecency, s. 25 of Act 559 created the offence of sexual relations between male persons. These are two entirely different offences. While s. 25 confines itself to sexual relations between two male persons, the offence under s. 377D covers a wider range of acts of gross indecency.

But the common denominator of all these offences, and the offence of *Liwat* is that they are all grossly indecent acts. It is clear also there is no corresponding offence of gross indecency in Act 559.

Given that the basis of a Syariah court's jurisdiction, as summarised earlier, is over the offence rather than the act itself, the fact that these are overlapping offences does not matter. While jurisdiction has been conferred by federal law to the Syariah Court over the offence of *Liwat* created under s. 25 of Act 559, no such jurisdiction has been conferred upon the Syariah Courts over the offences under the Penal Code, and specifically, ss. 377A or 377D thereof, to the Syariah Courts. The court therefore concludes that the Sessions Court retains jurisdiction over the offence of gross indecency even if committed by a Muslim. The cases *Re James Lee Kui Wah*, Tawau High Court Crim Misc Case M/6 of 1962 (Cases on Native Customary Law in Sabah by Tan Sri Lee Hun Hoe) and *Haji Laughan Tarki bin Mohd. Noor v. Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 SC may be read with some profit in this respect.

Power Of Attorney General/Public Prosecutor

Implicit in the above is the view that the offences of indecency under Act 559 can exist concurrently with the offences of indecency under the Penal Code, in the same way as offences of different degrees of indecency can co-exist. Article 121(1A), read with Item 1 of the State List operates to the effect that if jurisdiction over that offence, whether created by federal law or State law, is conferred upon the Syariah Court, the Sessions Court ceases to have jurisdiction. Until that jurisdiction is removed, the Sessions Court continues to have jurisdiction.

The power of the Public Prosecutor in respect of proceedings for an offence is provided by art. 145(3) read with s. 376 of the Criminal Procedure Code. What is absolutely clear is that he has no power to institute, conduct or discontinue any proceedings for an offence in a Syariah Court, a native court or a court-martial. Given this limitation to the civil courts, the public prosecutor, constrained to consider the options available to him, has elected to charge the applicant under s. 377D. But where the public prosecutor has made a decision, it is not for the court to question that decision. His discretion is unfettered: *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 2 MLJ 544 SC; *PP v. Lee Tin Bau* [1985] 1 MLJ 388; *PP v. Lim Shui Wang & Ors*

[1979] 1 MLJ 65 FC; *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; *Long bin Samat & Ors* [1974] 2 MLJ 152 FC. This leads us next to the question of the duty of a trial court.

Duty Of A Trial Court

The Sessions Court, presented with the charge under 377D and given the facts of the case, was right to have proceeded. There was no reason to act as suggested in *Wong Lai Fatt v. PP* [1971] 2 MLJ 31 FC to reject the plea of guilty. It is irrelevant to the court if the facts warrant a possibly more serious charge, or that the accused could have been charged in another court for another offence. A court, before which a charge is produced, is only concerned with, before convicting on a plea of guilty whether all the elements of the charge are admitted, or in the event of a trial, whether all of the elements of the charge are proven beyond reasonable doubt. It would be inconceivable and improper for the court, for example, upon being apprised of the facts, to amend the charge to a more serious charge merely because the facts suggest a more serious offence. That would amount to interference with the sole discretion of the Attorney General and Public Prosecutor under art. 145(3) of the constitution and s. 376(i) of the Criminal Procedure Code.

Other Matters

In the course of submissions by Encik Karpal Singh, I had alluded to the question whether the applicant is a Muslim. There is nothing to say that the Sessions Court was informed that the applicant was a Muslim. His name does not indicate he is a Muslim. It is a Javanese name. Even before this court, there is no assertion by the applicant that he is a Muslim. Only the supporting affidavits to the application, deposed by his sister, Komalawati Sasmita At Madja and his counsel, Encik Karpal Singh, deposed that the applicant is a Muslim. I appreciate the fact no objection was taken by the senior federal counsel since it would have raised the issue whether a non-Muslim could depose as to whether another person is a Muslim or not. There is nothing in the sister's affidavit to say she is a Muslim. I mention these in passing for two reasons.

Firstly that, following *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* that since whether a person has left the religion or not is for the Syariah Court to decide, it follows the question whether he is a Muslim is for the Syariah Court to decide. Or at the very least, by the assertion of that person or another Muslim who knows him. But it would be difficult to accept assertion by a third person to that effect who is not a Muslim or does not assert he or she is himself or herself a Muslim.

Secondly those complications may arise if in each and every case there is first to be an inquiry whether a person is a Muslim or not, and whether an offence is within the jurisdiction of the Sessions Court before the latter could proceed. The better view is that the Sessions Court *prima facie* has jurisdiction over an offence, unless and until the claim of being a Muslim is made, and a conviction remains lawful until a subsequent claim of being a Muslim is conceded or properly established. This means that the proper course to be taken is by way of adducing additional evidence if the issue is not conceded upon an appeal.

To digress a little for the moment, I note that the punishment under s. 25 is far lighter than under ss. 377B and 377C of the Penal Code creating the possibility that if a Muslim and a non-Muslim were to commit the offence together, the non-Muslim will face a heavier sentence for the same offence. However, given the conclusions arrived at in this case, it is not necessary for this court to consider whether s. 25 is contrary to art. 8 of the constitution and whether *liwat* is an 'offence by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List', or whether the offences over which federal law may confer jurisdiction to the Syariah Courts is restricted to those against the precepts of the religion of Islam, since these are not really essential in coming to a decision in this case on its particular facts. I have therefore decided not to proceed along the lines in *Hashim bin Saud v. Yahaya bin Hashim & Anor* [1973] 2 MLJ 85 or alternatively *Tun Datu Haji Mustapha bin Datu Harun v. State Legislative Assembly of Sabah & Anor* [1993] 1 CLJ 86 in respect of what is now s. 84 of the Courts of Judicature Act 1964.

Conclusion

Since gross indecency under s. 377D is a separate offence, and jurisdiction over it has not been conferred upon the Syariah Court by any federal law, Article 121(1A) cannot come into operation to remove the jurisdiction of the Sessions Court in relation to that offence. The Sessions Court remaining a court of competent jurisdiction, this court therefore can only conclude the applicant was lawfully sentenced to imprisonment by the Sessions Court. Where a person is undergoing a sentence passed by a court of competent jurisdiction, *habeas corpus* cannot be granted.

In the circumstances this application for a writ of *habeas corpus* is hereby dismissed.

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